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In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-559

UNITED STATES OF AMERICA, PETITIONER

v.

CHESTER FULLER AND MAXINE FULLER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

APPENDIX

RELEVANT DOCKET ENTRIES

1. Complaint in condemnation, filed Sept. 29, 1967.
2. Declaration of taking, tendered Sept. 29, 1967.
3. Order for delivery of possession, filed Sept. 29, 1967.
4. Notice of appearance of Chester Fuller & Maxine Fuller filed Oct. 18, 1967.
5. Pretrial order, filed May 27, 1968.
6. Trial order with jury verdict, filed June 17, 1968.
7. Judgment, filed Sept. 24, 1968.
8. Notice of appeal, filed Nov. 21, 1968.
9. Decision of court of appeals dated Apr. 29, 1971.
10. Judgment of court of appeals filed April 29, 1971.
11. Petition for rehearing by the United States filed June 16, 1971.
12. Order denying rehearing, filed June 23, 1971.
13. Order granting writ of certiorari, dated Jan. 17, 1972.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

UNITED STATES OF AMERICA, PLAINTIFF, VS. 939.62 ACRES OF LAND, more or less, situate in Yuma and Mohave Counties, State of Arizona; CHESTER FULLER, et al., and UNKNOWN OWNERS, DEFENDANTS.	No. Civ. 6471 Phx. Complaint in Condemnation

[Filed Sep. 29, 1967, WM. H. LOVELESS, *Clerk*, United States District Court for the District of Arizona, by WINONA ANDRE, *Deputy Clerk*]

1. This is an action of a civil nature brought by the United States of America at the request of the Acting Secretary of the Army for the taking of property under power of eminent domain and for the ascertainment and award of just compensation to the owners and parties in interest.

2. The authority for the taking is the Act of Congress approved February 26, 1931 (46 Stat. 1421, 40 U.S.C. 258a), and acts supplementary thereto and amendatory thereof, and under the further authority of the Acts of Congress approved April 24, 1888 (25 Stat. 94, 33 U.S.C. 591) and March 1, 1917 (39 Stat. 948, 33 U.S.C. 701), which authorize the acquisition of land for flood control projects; the Act of Congress approved December 22, 1944 (Public Law 534-78th Congress), which act authorizes the construction of Alamo Reservoir-Bill Williams River, Arizona, Colorado River Basin; and the Act of Congress approved October 15, 1966 (Public Law 89-689), which appropriated funds for such purposes.

3. The use for which the property is to be taken is in connection with the establishment of a flood control dam and reservoir at the Alamo site on the Bill Williams River, Arizona.

4. The interest in the property to be acquired is as follows:

a. The fee simple title to Tracts Nos. 309 and 310 subject, however, to existing easements for public roads and highways, public utilities, railroads, and pipelines.

b. A perpetual and assignable easement and right-of-way in, on, over, and across Tracts Nos. 200-E and 201-E, for the location, construction, operation, maintenance, alteration, and replacement of a road and appurtenances thereto; together with the right to trim, cut, fell, and remove therefrom all trees, underbrush, obstructions, and other vegetation, structures, or obstacles within the limits of the right-of-way; reserving, however, to the owners, their heirs, successors and assigns, the right to use the surface of the land as access to their adjoining land; subject, however, to existing easements for public roads and highways, public utilities, railroads, and pipelines.

5. The property so to be taken is described in the Exhibit A hereto attached.

6. The persons having or claiming an interest in the property whose names are now known are:

TRACT 309

Chester Fuller and Maxine Fuller, husband and wife

TRACT 310

Chester Fuller and Maxine Fuller, husband and wife

TRACT 200-E

Centroid Consolidated Mines, an Arizona corporation

TRACT 201-E

Stella D. Windham

The Merchants National Bank of Mobile, as trustee under the will of Stella Wilson Drake

First National Bank of Mobile, as trustee under the will of Jex H. Luce

Annie Meaher Hill

Helen R. Mealer, as trustee under the will of Augustine Mealer

Helen Mealer Sims

Augustine Meaher, Sr.

Dudley E. Hemphill, for the Estate of J. M. Hemphill, deceased

7. The State of Arizona and the Counties of Yuma and Mohave, Arizona, may have or claim an interest in the property by reason of taxes and assessments due and exigible.

8. In addition to the persons named, there are or may be others who have or may claim some interest in the property to be taken, whose names are unknown to the plaintiff and such persons are made parties to the action under the designation "Unknown Owners."

WHEREFORE the plaintiff demands judgment that the property be condemned and that just compensation for the taking be ascertained and awarded and for such other relief as may be lawful and proper.

EDWARD E. DAVIS
United States Attorney

/s/ Richard S. Allemann
RICHARD S. ALLEMANN
Assistant United States Attorney
5000 Federal Building
Phoenix, Arizona 85025

Trial by jury of the issue of just compensation is demanded by plaintiff.

EXHIBIT A

TRACT 309

The Northwest one-quarter and the South one-half of Section 9, the North one-half of the Southwest one-quarter, the Southeast one-quarter of the Southwest one-quarter, and the Southwest one-quarter of the Southeast one-quarter of Section 10, and the North one-half of the Northwest one-quarter of Section 15, all in Township 11 North, Range 12 West, Gila and Salt River Meridian, in the Counties of Yuma and Mohave, State of Arizona.

Containing 720.00 acres, more or less.

TRACT 310

The East one-half of the Northwest one-quarter, the South one-half of the Northeast one-quarter, and the Northeast one-quarter of the Southeast one-quarter of Section 14, Township 11 North, Range 12 West, Gila and Salt River Meridian, in Counties of Yuma and Mohave, State of Arizona.

Containing 200.00 acres, more or less.

TRACT 200-E

Those portions of Hancock No. 1, Hancock No. 3, Hancock No. 4, Black Hawk No. 1, Black Hawk No. 3, and Centroid No. 15, lode mining claims, in the Ellsworth Mining District, Yuma County, Arizona, as shown on Mineral Survey No. 4344 on file in the Bureau of Land Management located in approximately Sections 7 and 18, Township 7 North, Range 12 West, Gila and Salt River Meridian, lying within a strip of land of various widths, being 55 feet on the right or Northeasterly side and 50 feet on the left or southwesterly side of a survey line between Survey Stations 447+67.40 and 490+00, as hereinafter designated and being 50 feet on the right or Northeasterly side and 60 feet on the left or Southwesterly side of said survey line between said Station 490+00 and Station 508+48.96 (back)=508+49.60 (ahead), basis of bearings for said survey line being the Transverse Mercator Grid, West Zone, Arizona:

Commencing at a point in the South line of said Section 18 (being Survey Station 447+6740) distant North 89°

54′ 49″ East 634.91 feet from the South ¼ corner of said section; thence along said survey line North 19° 26′ 38″ West 1801.00 feet, more or less, to the TRUE POINT OF BEGINNING in the Southeasterly line of said lode mining claim, Hancock No. 3, said true point of beginning being 109.34 feet, more or less, Southwesterly of the most Easterly corner of said mining claim; thence continuing North 19° 26′ 38″ West 472.71 feet, more or less, to a point distant North 19° 26′ 38″ West 2273.71 feet from the point of commencement, last said point being Survey Station 470 +41.11 and being the beginning of a tangent curve concave Southwesterly, having a radius of 1500 feet; thence Northwesterly along said curve, through a central angle of 14° 21′ 23″ a distance of 375.84 feet; thence North 33° 48′ 01″ West 1232.71 feet to the beginning of a tangent curve concave Southwesterly, having a radius of 1000 feet; thence Northwesterly along last said curve through a central angle of 10° 01′ 30″ a distance of 174.97 feet; thence tangent to last said curve North 43° 49′ 31″ West 175.37 feet to said Survey Station 490+00; thence continuing North 43° 49′ 31″ West 138.56 feet to the beginning of a tangent curve concave Northeasterly, having a radius of 5000 feet; thence Northwesterly along said curve through a central angle of 6° 10′ 30″ a distance of 538.87 feet; thence North 37° 39′ 01″ West 470.83 feet to the beginning of a tangent curve concave Southwesterly, having a radius of 3000 feet; thence Northwesterly along said curve through a central angle of 5° 42′ 34″ a distance of 298.95 feet; thence North 43° 21′ 35″ West 102.80 feet to the beginning of a tangent curve concave Northeasterly, having a radius of 3000 feet and a total central angle of 5° 42′ 34″ and a total length of 298.95 feet; thence Northwesterly along said curve 192.93 feet, more or less, to the intersection with the Northwesterly line of said Centroid No. 15, said intersection being distant 56.86 feet from the most Westerly corner of said mining claim; thence continuing Northwesterly along said curve 106.02 feet, more or less, to the end thereof at said Survey Station 508+48.96 (back)=508+49.60 (ahead); thence North 37° 39′ 01″ West 254.70 feet to a point in the West line of said Section 7, distant North 0° 04′ 32″ West 98.84 feet from the Southwest corner of said Section 7.

Containing 10.26 acres, more or less.

TRACT 201-E

Those portions of OLD TIMER, shown on Mineral Survey No. 3529; WISCONSIN, shown on Mineral Survey No. 3530; BUCK, RED ROSE and LITTLE GEM No. 1, shown on Mineral Survey No. 3631; ALABAMA and CHOCTAW, shown on Mineral Survey No. 3984, all being lode mining claims, in the Ellsworth Mining District, Yuma County, Arizona, as shown on the said mineral surveys on file in the Bureau of Land Management, and located in approximately Sections 7 and 18, Township 7 North, Range 12 West and Sections 12 and 13, Township 7 North, Range 13 West, Gila and Salt River Meridian, within a strip of land, 110 feet in width, lying 60 feet on the left or Southwesterly side and 50 feet on the right or Northeasterly side of a survey line described as follows, basis of bearings of said line being the Transverse Mercator Grid, West Zone, Arizona:

Commencing at the Section corner common to said above-mentioned sections; thence South 39° 07′ 24″ East 269.0 feet, more or less, to the most Westerly corner of CENTROID No. FIFTEEN, a patented mining claim, as shown on the Plat of Mineral Survey No. 4344, on file in the Bureau of Land Management; thence Northeasterly 56.86 feet, more or less, along the Northwesterly line of last said mining claim and along the Southeasterly line of said BUCK claim the TRUE POINT OF BEGINNING, said true point of beginning being Survey Station 507+42.94 and being in a curve concave Northeasterly, having a radius of 3000.00 feet; thence Northwesterly along said curve 106.02 feet to the end thereof at Survey Station 508+48.96 (back)=508+49.60 (ahead); thence tangent to said curve North 37° 39′ 01″ West 254.70 feet to a point in the line common to said Sections 7 and 12; North 0° 04′ 32″ West 98.84 feet from said common section corner; thence continuing North 37° 39′ 01″ West 2244.18 feet to the intersection with the Northerly line of said LITTLE GEM No. 1, said intersection being Easterly 628.86 feet from the Northwest corner of last said claim; thence continuing North 37° 39′ 01″ West 1098.05 feet, more or less, to the point of ending in the Northwesterly line of said ALABAMA claim, said point of ending being 87.04 feet, more or less, Northeasterly from the most Westerly corner of ALABAMA.

Containing 9.36 acres, more or less.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

UNITED STATES OF AMERICA, PLAINTIFF, VS. 939.62 ACRES OF LAND, MORE OR LESS, SITUATE IN YUMA AND MOHAVE COUNTIES, STATE OF ARIZONA, AND CHESTER FULLER, ET AL., DEFENDANTS	Declaration of Taking Civil No. 6471-Phx.

[Filed Sep. 29, 1967, WM. H. LOVELESS, *Clerk*, United States District Court for the District of Arizona, by WINONA ANDRE, *Deputy Clerk*]

To THE HONORABLE,
THE UNITED STATES DISTRICT COURT:

I, DAVID E. MCGIFFERT, Acting Secretary of the Army of the United States of America, do hereby declare that:

1. (a) The land hereinafter described is taken under and in accordance with the Act of Congress approved February 26, 1931 (46 Stat. 1421, 40 U.S.C. 258a), and acts supplementary thereto and amendatory thereof, and under the further authority of the Acts of Congress approved April 24, 1888 (25 Stat. 94, 33 U.S.C. 591) and March 1, 1917 (39 Stat. 948, 33 U.S.C. 701), which authorize the acquisition of land for flood control projects; the Act of Congress approved December 22, 1944 (Public Law 534-78th Congress), which act authorizes the construction of Alamo Reservoir-Bill Williams River, Arizona, Colorado River Basin; and the Act of Congress approved October 15, 1966 (Public Law 89-689), which appropriated funds for such purposes.

(b) The public uses for which said land is taken are as follows: The said land is necessary to adequately provide for the control of flood waters from the Bill Williams River and its tributaries and for other uses incident thereto.

The said land has been selected by me for acquisition by the United States for use in connection with the establishment of a flood control dam and reservoir at the Alamo site on the Bill Williams River, Arizona, and for such other uses as may be authorized by Congress or by Executive Order.

2. A general description of the land being taken is set forth in Schedule "A" attached hereto and made a part hereof, and is a description of the same land described in the complaint in the above entitled cause.

3. The estates taken for said public uses are:

a. The fee simple title to Tracts Nos. 309 and 310 subject, however, to existing easements for public roads and highways, public utilities, railroads, and pipelines.

b. A perpetual and assignable easement and right-of-way in, on, over, and across Tracts Nos. 200-E and 201-E, for the location, construction, operation, maintenance, alteration, and replacenent of a road and appurtenances thereto; together with the right to trim, cut, fell, and remove therefrom all trees, underbrush, obstructions, and other vegetation, structures or obstacles within the limits of the right-of-way; reserving, however, to the owners, their heirs, successors and assigns, the right to use the surface of the land as access to their adjoining land; subject, however, to existing easements for public roads and highways, public utilities, railroads, and pipelines.

4. Plans showing the land taken are annexed hereto as Schedule "B" and made a part hereof.

5. The sum estimated by me as just compensation for said land, with all buildings and improvements thereon, and all appurtenances thereto and including any and all interests hereby taken in said land, is set forth in Schedule "A" herein, which sum I cause to be deposited herewith in the registry of the said court for the use and benefit of the persons entitled thereto. I am of the opinion that the ultimate award for said land probably will be within any limits prescribed by law on the price to be paid therefor.

IN WITNESS WHEREOF, the United States of America, by its Secretary of the Army, thereunto authorized, has caused this declaration to be signed in its name by said DAVID E. MCGIFFERT, Acting Secretary of the Army, this 4th day

of August, A.D. 1967, in the City of Washington, District of Columbia.

/s/ David E. McGiffert
Acting Secretary of the Army

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

UNITED STATES OF AMERICA, PLAINTIFF, VS. 939.62 ACRES OF LAND, more or less, situate in Yuma and Mohave Counties, State of Arizona; CHESTER FULLER, et al., and UNKNOWN OWNERS, DEFENDANTS.	No. Civ. 6471-Phx. Order For Delivery of Possession

[Filed Sep. 29, 1967, WM. H. LOVELESS, *Clerk*, United States District Court for the District of Arizona, by WINONA ANDRE, *Deputy Clerk*]

This action coming on for hearing ex parte upon motion of plaintiff for an order for the surrender of possession of the property described in the Complaint in Condemnation filed herein to plaintiff, and it appearing that plaintiff is entitled to possession of the said property,

It is this 29th day of September, 1967, adjudged that all defendants to this action and all persons in possession or control of the property described in the Complaint in Condemnation filed herein shall surrender possession of the said property, to the extent of the estate being condemned, to plaintiff immediately; provided that a copy of this order shall be served upon all persons in possession or control of the said property forthwith.

/s/ Walter E. Craig
United States District Judge.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

UNITED STATES OF AMERICA, PLAINTIFF, VS. 939.62 ACRES OF LAND, more or less, situate in Yuma and Mohave Counties, State of Arizona; et al., DEFENDANTS.	No. Civ. 6471 Phx. Entry of Appearance

[Filed Oct. 18, 1967, WM. H. LOVELESS, *Clerk,* United States District Court for the District of Arizona, by WINONA ANDRE, *Deputy Clerk*]

COME Now Chester Fuller and Maxine Fuller, husband and wife, and enter their appearance in the above entitled and numbered cause and request copies of all orders, notices and other pleadings in said cause.

DATED this 18th day of October, 1967.

SNELL & WILMER
By Mark Wilmer
MARK WILMER
Attorneys for said defendants
400 Security Building
Phoenix, Arizona 85004

COPY mailed this 18th day of October, 1967 to:

EDWARD E. DAVIS
United States Attorney

RICHARD S. ALLEMANN
Assistant U.S. Attorney
5000 Federal Building
Phoenix, Arizona 85025
Attorneys for Plaintiff

/s/ Mark Wilmer
MARK WILMER

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

UNITED STATES OF AMERICA,
PLAINTIFF,

VS.

939.62 ACRES OF LAND, etc. et al.,
DEFENDANTS.

[Filed May 27, 1968, WM. H. LOVELESS, *Clerk*, United States District Court for the District of Arizona, by WINONA ANDRE, *Deputy Clerk*]

At a pretrial conference in the above entitled cause the parties raised the issue as to the appropriate method of valuation of the lands to be condemned. It is the government's position that, in determining the fair market value of the lands to be condemned and in determining the highest and best use to which the lands may be put presently and in the reasonable foreseeable future, no consideration should be given to the use to which the lands might be put in conjunction with other adjacent lands covered by state leases and federal grazing permits. It is the contention of the defendants, owners of the condemned lands, that, in determining the fair market value, the highest and best use to which the lands might be put are that of a cattle ranch, and therefore the use of the condemned lands in conjunction with adjacent federal grazing lands to which defendants have access, and state leases to which the defendants have access should be considered in the determination of the fair market value and the highest and best use.

Each of the parties has submitted memorandum in support of their respective positions. The Court being fully advised in the premises finds:

1. That in the determination of the fair market value of the premises in question the highest and most profitable use to which the lands might be put must be determined.

If the highest and most profitable use to which the lands might be put is determined to be in connection with a cattle operation, then in that event the use of the lands

in connection with adjacent public lands to which the defendant owners have access by way of federal permits or state leases shall be considered, provided consideration is also given to the possibility that the grazing permits or state leases might be withdrawn or canceled at any time without constitutional obligation to pay compensation therefor. *U.S.* v. *Jaramillo,* 190 F.2d 300.

IT IS SO ORDERED.

2. Defendants contend that it is appropriate to consolidate the above entitled cause with cause No. Civ-6005 Phx., United States v. 2562.92 Acres of Land, etc., et al., involving a leasehold interest in the State of Arizona, currently held by defendants along with other lands. The Court is of the opinion that, while it might be appropriate, it is not necessary to the determination of the issues in the above entitled cause that cause No. Civ-6005 Phx. be consolidated for trial. The motion to consolidate is therefore denied.

IT IS SO ORDERED.

DONE at Phoenix, Arizona, this 24th day of May, 1968.

/s/ Walter E. Craig
United States District Judge

Copies mailed to:
United States Attorney
FRANK HAZE BURCH, Esquire

[12] We will show you that once this land has been taken from him, he can no longer operate this ranch as an economic unit. I don't want to go into what an economic unit is. You will hear that term many times from many of the witnesses that are going to testify here.

* * * * *

[15] You will be told that this ranch can only support a steer-type operation without the deeded land that Mr. Fuller owns. In other words, if this deeded land were not there, all this land could hold would be to graze steer on a basis which would not be a consistent basis, a very inconsistent basis.

You will be told also, ladies and gentlemen, that this area which is being taken from Mr. and Mrs. Fuller is a very unique area. It has a very unique water supply. There is an abundance of water in this area. As a matter of fact, on this piece of land which I am pointing to, the smaller of the two pieces, you will be told that there is an artesian spring, a spring capable of producing 1200 gallons of water per minute without the necessity of putting a pump on it; that this artesian spring was probably created by forces in the earth years and centuries ago, many millions of years ago; and that in addition to the artesian spring, the Santa Maria River provides an underground area of water availability that is unique in Arizona and unique in Yuma County.

You will be told that this particular area has a high and best use to stabilize a cow-calf type operation. You will hear that word "stability," "stabilize," and "cow-calf type operation." You will be told that this area, by using the natural terrain and by using the water that is [16] available in abundance, is capable of producing a range of bermuda and alfalfa grass for the grazing of a cow-calf type operation.

You will be told that the highest and best for this land is the very use that Chester Fuller put it to and the very use which he intended putting to it throughout his development stage. The development stage of this thing, of course, you will be told, stopped sometime before 1967 when Chet Fuller realized that he could get no more money to continue

the development of this area, because the Government had announced to the State Land Department and to others that they were going to take this area. So the area that I am pointing to here, as far as Chet Fuller was concerned, back around 1964 or '65, became an area which could sustain a cow-calf type operation but that he could not further develop because of the Government's threat of seizure because of the Alamo Dam.

Now, you will hear me question witnesses and Mr. Allemann question witnesses about: "Mr. So and So, what is the highest and best use of this ground?" Every witness that we will bring before you will tell you that the highest and best use for this ground and the purpose for which it is best suited is to maintain and stabilize a cow-calf type operation and to use it to supplement the range which is naturally there and which Mr. Fuller can have complete use and [17] freedom to use under his permits with the Federal Government and with the State Government.

You will be told that this particular area here is capable of sustaining anywhere from 900 to 1200 cow units on a year-round basis.

Now I come to another term. You are going to hear a great many terms here and it might be a bit difficult for you to comprehend them, but I want to bring this to your attention, so that when you hear this term you will listen carefully.

A "cow unit" is not a cow. A cow unit is defined as a mother cow and its calf, a calf by its side for a one-year period of time. That is a cow unit, very briefly and very generally. There are other ways of getting cow units.

You will also hear the term "animal unit." An "animal unit" very briefly is a thousand-pound animal, whether it be a dry cow or a steer; that is an animal unit.

Now, you will be told that this area is capable of sustaining anywhere from 900—the opinions vary—anywhere from 900 to 1200 cow units per year, and that with the availability and accessibility of the federal and state ranges it really makes this a stable type cow-calf operation.

You will also be told that even without the federal and state ranges, that the area involved is a stable [18] cow-calf type operation.

You will be told that the water in abundance and the favorable climate of Yuma County, lending itself to a good growing season, makes this a very unique cow-calf type

operation. This is what Chet Fuller had. This is what was taken from him, you will be told.

Now, among the things you will hear is another term called "comparables." People value land by going out and looking at other land of the same type and general quality or the same type of carrying capacity. That term means simply how many cow units or how many animal units will land hold, what is the carrying capacity of it. And so some of these appraisers will go out and tell you, "Well, we have checked the market on this particular type ranch and we believe that it compares favorably with this ranch over here," or "We believe that we have looked at another ranch and they want so many dollars per cow unit, and we believe that Mr. Fuller's ranch is worth more than that," or "We believe that it's worth less than that." And so you will get a variety of opinions with respect to the value of the carrying capacity of the cow units on Mr. Fuller's ranch. Very generally, though, however, you will get valuations on the value of a cow unit running anywhere from $800 a cow unit to $1000 a cow unit.

* * * * *

[20] on them at all, although some of the witnesses believe that these areas also could be developed.

The little area up in the middle with the initials "PS" in it simply is a 40-acre piece of land which the Government owns. The "PS" stands for "power site." Evidently the Government at some point of time before Chet bought the ranch, or maybe sometime during the purchase of it, withheld 40 acres of this land for a power site location.

That generally is the type of evidence that I think you will hear from the witness stand about categorizing this land.

You will be told that because of the taking, ladies and gentlemen, Chet Fuller and his wife can no longer maintain an economic cow-calf type operation. You will be told what the value of the remaining land is now after taking of the deeded land, and at that point you will be given by various people their appraisals of what they believe the damages are that have been sustained by Mr. Fuller.

So that you might have a bird's-eye view of what some of the witnesses will testify relative to damages, let me tell you that the damages which we believe we can show are going to range anywhere from estimates of $682,000

to $890,000. This is going to be shown to you by four or five different people, including Mr. Fuller, people that are schooled in this, people that have appraised this particular property.

FOR THE LANDOWNER—PERCY E. COE: DIRECT

[31] Q What did you find the total deeded acreage to be that was within the area that is being taken by the United States Government?

A 920 acres.

• • • • •

REDIRECT

[135] Q (By MR. CRACCHIOLO) Let me ask you this:

Mr. Allemann asked you on cross-examination with reference to feasibility of use. Do you have an opinion as to whether or not this land is feasible to use with the expenditure of $30,000?

A Yes, I do.

Q What is your opinion?

A My opinion is that it is feasible.

Q Mr. Coe, you have worked in the State of Arizona for many years in this particular area of reclamation, have you not?

A Yes, I have.

Q Can you give the jury a comparable area of deeded land which has the abundance of water that this land has?

A It would be difficult. This is rather unique. I wouldn't want to say there were no other areas in Arizona. There are possibly some down around Nogales on Sonoita Creek and Arivaca Creek. That would be about all that I know of.

Q This has been your work for how long, Mr. Coe?

A I suppose you might say since 1940.

Q Have you ever found an area that has the abundant water supply and accessibility of land for cultivation [136] that this does?

A I can't think of any, no.

Q In coming to the conclusion that this land is feasible for use, sir, and in taking into consideration the abundance of water and type of soil that surrounds this particular area, did you take these matters into consideration when you capitalized the value of water to Mr. Fuller yesterday?

A Yes, I did.

Q And is that the reason you capitalized that on a fifty-year basis?

A That, plus the fact that the water supply is available for fifty years.

Q I see. Do you feel that the water supply would be available in this area for at least fifty years?

A Yes, I do.

FOR THE LANDOWNER—LAWRENCE S. PERRY: DIRECT

[173] I collected information that led me to believe that the best use for this property would be to take advantage of the very, very abundant water supply down there that's available at low cost and use it for the purpose that it has been used for, as a cattle ranch. And more specifically, that land that could be irrigated and kept in feed most year-round as a year-round cattle ranch.

• • • • •

[178] A My opinion is that the highest and best use was as a year-round cattle ranch, utilizing the abundant water, low-priced irrigation, and combining with it seasonal use of the higher desert lands when nature provided a supply of forage on those lands.

Q What type of cattle ranch operation?

• • • • •

[179] I felt that as far as holding it for future price rises, well, this doesn't require any positive action. You have the land. Practically every ranch in Arizona has this use built right into it, if development eventually catches you. But, in the meantime, that the productive use of this land would be the most logical use and would bring the most return to the owner would be in the form of a year-round cow and calf ranch.

THE COURT: That, I take it, was because of its location, availability of water, nature of the terrain, the fact that the elevation was such that it could grow enough feed to hold "X" number of cattle.

THE WITNESS: Yes, sir. It has the capability of growing good, highly nutritious feed without excessive costs, and it is well suited for this type of an operation.

THE COURT: And moreover, it had been used for that?

THE WITNESS: Yes, sir, that is true.

THE COURT: Very well. Go ahead.

Q (By MR. CRACCHIOLO) What do you mean by "cow-calf operation," sir?

A Well, I use this term to differentiate a type of ranch. In other words, a cow-calf operation is a ranch on which you maintain a herd of adult cattle, of cows and bulls. And you sell the increase, the calves. This differentiates it from what is commonly called a steer operation, which is [180] generally a seasonal operation in which perhaps you only have winter feed or summer feed, depending on what part of the state you may be in. And you put young livestock on this seasonal forage for a period of weeks or months and then sell them off.

Q Mr. Perry, taking away the deeded land, all of the deeded land of Mr. Fuller—this isn't being taken away, but for the moment we take all of the deeded land away from Mr. Fuller—what use would this property have?

MR. ALLEMANN: I fail to see the materiality. That is not the situation here. I don't know where we are going by this.

THE COURT: Oh, I suppose it is for illustration.

MR. CRACCHIOLO: Just for illustration.

THE COURT: Overruled.

Q (By MR. CRACCHIOLO) What availability would you have?

A It would be available for a seasonal steer use on those years when nature provided enough rain to make feed down there on the desert which could be used for that purpose.

Q Would it have a dependable carrying capacity for steers?

A Oh, no, sir. There might be years when you could put—I won't say zero, because probably a few could—but a very limited number of cattle on there.

* * * * *

[183] revocation at any time without compensation, as well as the Taylor grazing lease?

THE WITNESS: Yes, sir. I considered that fact.

THE COURT: This is not unusual in cattle operations in Arizona?

THE WITNESS: No, sir. I used sales of properties that had varying amounts of public lands that would be subject to this very same hazard.

THE COURT: Very well.

Q (By MR. CRACCHIOLO) What were the factors, Mr. Perry, that you took into consideration in arriving at that price in the before situation, taking into consideration that the state leases and federal Taylor grazing leases are subject to revocation?

A Well, some of the many factors I took into account were the carrying capacity of this ranch.

Q Let me get up here, so that we can mark these down. Go ahead.

A The carrying capacity of the ranch, the abundant water supply, the ability to produce a good quantity of the high quality forage—the word I like to use is "balance"—the availability and accessibility and stability that is given to this ranch by the presence of the public lands.

[184] Q You used the word "stability"?

A Stability, yes, sir.

Q In what type of context? Stability in what?

A In this sense, that a ranch which has the ability to carry a breeding herd of cows year-round and has in addition the possibility of being able to carry the calves to a little greater weight and little greater age, put—what in ranch terminology is called "put a cheap gain on them." After all, the rancher's product is calves, a beef—he is running a beef factory.

Q Would the words "stability of cow operation" suffice——

A Yes, that would condense it down.

• • • • • •

[193] Did you at any time in your calculations to come to the value after this deeded land has been taken, ever take into consideration any monetary compensation for the loss of cow units by loss of the cow units by virtue of the public domain?

A Well, mathematically it was here and I set it out in my report as what I called a non-compensable item. I appraised the property before, I appraised the property after, and I broke the difference down into the value of what was taken from the deeded, the value of the loss of the

public as a separate non-compensable item, and the residue of this difference was what I considered severance to the remainder.

Q You did that in considering the value after the deeded land was taken, didn't you?

A Yes.

Q Precisely, here is what I want to get at:

The $1,150,000 includes the cow units in the public domain, doesn't it?

A Yes, it does.

• • • • •

[263] THE WITNESS: He has 360.

THE COURT: Tell me this, Mr. Perry:

The deeded lands originally are in about three different parcels, aren't they?

THE WITNESS: Yes, sir, they are. In the aerial photograph on the right-hand side there is a parcel outlined in yellow.

THE COURT: Yes. And two others?

THE WITNESS: Yes, sir.

THE COURT: Would you consider any single parcel an economic unit by itself?

THE WITNESS: It would be very difficult to consider that it would be. The one that would have the most possibility of being, sir, would be that Three Rivers parcel, the biggest one furthest to the west.

And if I may indulge your time for just a moment, I think I have a better answer to that.

(Pause.)

I believe that we could consider the Three Rivers parcel to be pretty close to an economic unit all by itself, assuming that you were able to tie the water together, and so forth.

THE COURT: When you refer to it as an economic unit, would you still consider its highest and best use to be that as a base for a cattle operation?

[264] THE WITNESS: Yes, sir.

THE COURT: So you keep in mind the necessity of using it in connection with public lands that were adjacent and accessible?

THE WITNESS: Yes, sir. There again, these public lands

give it the balance that most typical ranchers are interested in having.

THE COURT: I see. Go ahead.

• • • • •

[329] Q And you told us that the ranch had a 1200 animal unit capacity?

A 1200 cow unit capacity.

Q 1200 cow unit capacity.

You mean then these three parcels, did you not?

A Those three parcels in combination with the public land.

Q In combination with the public land?

A Yes, sir.

• • • • •

[333] Then, getting to the cow unit figure from there was a matter of dividing the cow units into the $1,150,000, and it comes out to be $899.58 per cow unit.

Q Where did you get your 1200 cow units?

A I estimated this on the basis of land that as of my inspection was either irrigated or with very little rehabilitation could be put into irrigation, or with very, very little additional development, in some cases less than the rehabilitation, could be put into irrigation.

And then, taking that land, figuring that approximately ten per cent of it would have to be set aside to grow winter feed on, and estimating that on the balance, under proper management, with adequate water and by the addition of fertilizer, and by the use of the fringe lands when feed is available—and by the "fringe lands," we have kind of ignored it as part of the property, and namely the deeded land that isn't under irrigation, the boundaries, the borders, we'll say, and the river bed, and so on—that we could carry two cow units per irrigated acre of bermuda grass, and as I say, by using part of the irrigated acres, set aside for a winter feed program.

• • • • •

[340] Q Prior to that you had subtracted the desert, the value of the carrying capacity of the Taylor grazing land, from $1,150,000, and got $1,067,500, didn't you?

You can understand my——

A I don't recall making that computation, sir, but I think I probably did the same thing, in effect, when I broke down the difference between before and after. But would you give me the figures again?

Q That's all right. My notes may be bad.

In any event, to support your opinion of valuation of both before and after, Mr. Perry, it is necessary, many things are necessary, that your comparables reflect an accurate before value of the ranch, that the carrying capacity is in fact 1200 units, that there is in fact the economically developed land that you have told us you thought it was, and that the value per cow unit is what you arrived at in order to come to your figure; is that not correct?

A Yes.

* * * * *

[418] "Q Let me ask you this: do you have an opinion as to whether or not this is a good area for underground water supply, irrespective of what you saw on April 15th and April 25th?

"A It is a good area. There is water there and the lift is very small compared to other areas.

"Q When you say the lift is very small, have you done any studies with reference to the lift?

"A Well, the wells, when they were pumped at high discharge, were pumping from 25 to 30 feet beneath the surface, and I know of no place else in Arizona where you could do that.

"Q So is it a good water area?

[419] "A Yes, it is.

"MR. CRACCHIOLO: I have nothing further.

* * * * *

CHESTER FULLER LANDOWNER—DIRECT

[464] Q (By MR. BURCH) Now, Mr. Fuller, referring again only to your deeded land, let me ask you this:

You have stated, I believe, that your opinion was the highest and best use of the total Palmarita Ranch was as a mother cow operation; is that correct?

A Yes.

Q And will you review briefly for the jury the factors

that you considered this ranch had that qualified it for a mother cow operation?

A Well, it had of course the fine water and the very fine climate for growing the kind of crops that we have to have. Then, we have the soil, which is not quite so important but still is necessary.

Then we also have the availability of federal land, as well as state land.

J. N. McDougal, Agricultural Advisor for the people of Mohave County, now the University of Arizona.

[586] Q Where did most of it lie?

A Adjacent to the river or in the river bottom.

Q Now, sir, did you view this area that Mr. Fuller showed you—did you come to a conclusion as to what you could use this particular area that Mr. Fuller showed you, as to its highest and best use?

A I think that with its adjacent range land there that he is using, a cow-calf operation probably would be its highest use, pasture.

Q Why do you say that?

A Well, he needs that additional forage during the dry period on the desert.

Q When you say he needs that additional forage, what type of forage can he grow there?

A Well, at the present time he has alfalfa and bermuda grass pastures. Most any type of forage can be grown there.

Q Did you look and observe the water condition?

A I did.

Q What did you find?

A I found a water source that I don't think can be duplicated or seen anywhere else.

Q Mr. McDougal, did you look at this area which [587] surrounds this water source and observe it?

A Yes, I did.

Q I want you to assume that this area is approximately 920 acres of land. Do you have any idea as to how much of this land could be put into a forage type crop?

A Well, today, with the modern sprinkler systems, hardly any land is not accessible, as far as being irrigated.

Q What do you mean by "modern sprinkler system"?

A Well, there are so many different types of sprinkler systems, some that shoot out a hundred or so feet in distance. And you don't have to traverse them over steep land, and such as that. Where the land is level or partially level, it works better yet. But most all of that land could be irrigated with a sprinkler system.

Q What type of crop could be grown?

A Forage type crops.

Q Suitable for what type of cattle operation?

A Livestock grazing.

Q Or——

A Or for hay in the flatter area.

Q Would it be suitable in its highest and best use for a cow-calf type of operation?

A I think so, with the adjacent land that is in there.

* * * * *

[590] A I don't think that you can find a free-flowing spring anywhere in the western United States. I haven't seen it, and I have traveled quite extensively.

Q You have seen no other such spring?

A Not of its size.

FOR LANDOWNER—CLOSING ADDRESS TO JURY:

[1018] MR. CRACCHIOLO

* * * * *

And adding to the Arizona Ranch and Metals Company holdings and these little acres is like taking the heart out of this ranch. And it isn't even similar, it isn't even comparable, it isn't even in the same situation. It's like saying to a human being, "We'll remove your heart, it isn't worth very much, it's such a little organ." But it destroys the body.

INSTRUCTIONS TO JURY BY COURT

* * * * *

[1049] During the course of this trial, reference has been made to grazing permits held by the defendants on public land. You are instructed that such permits are mere licenses which may be revoked and are not compensable as such. However, should you determine that the highest and best use of the property taken is a use in conjunction with those permit lands, you may take those permits into con-

sideration in arriving at your value of the subject land, keeping in mind the possibility that they may be withdrawn or canceled at any time without a constitutional obligation to pay the compensation therefor.

Evidence has been introduced of defendants' use of their deeded land which is being taken, in conjunction with surrounding land owned by the United States, for which defendants have grazing permits, and land belonging to the State of Arizona, which defendants lease. In fixing the fair market value of the fee land being taken and the compensation to be awarded, you are not to award defendants any compensation for the land owned by the United States or [1050] the State of Arizona. However, in determining the value of the fee land and in awarding compensation to the owners, you should consider the availability and accessibility of the permit and leased land and its use in conjunction with the fee land taken and give to the fee land such value as, in your judgment, according to the evidence, should be given on account of such availability and accessibility of the permit and leased land, if any. You should also consider the possibility that the permits on the United States land could be withdrawn at any time without constitutional obligation to pay compensation therefor and determine the effect you feel such possibility, according to the evidence, would have upon the value of the fee land.

GOVERNMENTS' OBJECTIONS & INSTITUTIONS

[1057] requested Instruction No. 4, with specificity to the last paragraph thereof.

The Government excepts to the refusal of the Court to give Plaintiff's requested Instruction No. 5.

The Government excepts to the modification of Plaintiff's requested Instruction No. 7 in striking out the words "nor what defendants claim it was worth to them, nor what it may be worth to the plaintiff."

The Government excepts to the refusal of the Court to give Plaintiff's requested Instruction No. 8.

The Government excepts to the modification of Plaintiff's requested Instruction No. 20 in the striking out of subsection 3 thereof, which reads: "any opportunities the land-

owners may have lost by reason of the taking of this property."

The Government excepts to the refusal of the Court to give Plaintiff's requested Instructions No. 21 and No. 22.

The Government further excepts to the giving, as modified, of Defendants' requested Instruction No. 9.

And for the record, Your Honor, we would like to reiterate our continuing objection to the allowance of testimony on a unit, considering the parcels as a unit, and considering as a unit, based upon the cases set forth in our pretrial memorandum.

JURY'S VERDICT

PRESCOTT, ARIZONA, MONDAY, JUNE 17, 1968, 10:45 O'CLOCK, P.M.

PROCEEDINGS

[1059] THE COURT: You may call the jury.

IN THE PRESENCE OF THE JURY:

THE COURT: Ladies and gentlemen, have you reached a verdict?

THE FOREMAN: Yes, Your Honor, we have.

THE COURT: You may pass it to the bailiff, please.

(Handed to the bailiff and then to the Court.)

THE COURT: You may read the verdict.

THE CLERK: (READING) "In the United States District Court for the District of Arizona, United States of America, Plaintiff, versus 939.62 acres of land, more or less, situate in Yuma and Mohave Counties, State of Arizona; Chester Fuller, et al. and unknown owners, defendants, No. Civil 6471-Phoenix, verdict:

"We, the jury, find the fair market value of and just compensation for the property and estate condemned herein, as of September 29, 1967, to be as follows:

Tract No. 309	$245,000
Tract No. 310	$105,000

"The total fair market value of and just compensation for the property and estate condemned herein, as of September 29, 1967, is:

[1060] Total $350,000.
"Dated this 17th day of June, 1968.
Laurence E. Powers, Foreman."

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

UNITED STATES OF AMERICA, PLAINTIFF, VS. 939.62 ACRES OF LAND, more or less, situate in Yuma and Mohave Counties, State of Arizona; CHESTER FULLER, et al., and UNKNOWN OWNERS, DEFENDANTS.	No. Civ. 6471-Phx. Judgment Tracts 309 and 310

[Filed Sept. 24, 1968, WM. H. LOVELESS, *Clerk*, United States District Court for the District of Arizona, by WINONA ANDRE, Deputy Clerk]

The above-entitled cause came on for jury trial before the Honorable Walter E. Craig on June 10, 1968 for the purpose of determining just compensation for the estate taken by the plaintiff in the lands designated as Tracts 309 and 310 in the Declaration of Taking filed herein, which estate was taken by the plaintiff as of September 29, 1967.

Evidence was submitted by the plaintiff and by the defendants at the conclusion of which the jury returned its verdict as follows:

"We, the Jury, find the fair market value of and just compensation for the property and estate condemned herein, as of September 29, 1967, to be as follows:

Tract No. 309	$245,000.00
Tract No. 310	$105,000.00

The total fair market value of and just compensation for the property and estate condemned herein, as of September 29, 1967, is:

Total	$350,000.00

DATED This 17 day of June, 1968.

LAWRENCE E. POWERS
Foreman"

The Court being fully advised in the premises, IT IS ORDERED, ADJUDGED AND DECREED:

1. That, the plaintiff had the right to take, and did take, as of September 29, 1967, the estate set forth and described in the Declaration of Taking and the Complaint in Condemnation, filed herein, in Tracts 309 and 310, and title thereto was thereby vested in the United States;

2. That, the just compensation for the estate taken in Tracts 309 and 310 is the sum of $350,000.00, in accordance with the verdict set forth above;

3. That, on September 29, 1967, there was deposited in the Registry of the Court the sum of $136,500.00 as estimated just compensation for Tracts 309 and 310;

4. That, on December 22, 1967 and March 4, 1968, the defendants, Chester Fuller and Maxine L. Fuller, his wife, withdrew the sum of $136,000.00 from the Registry of the Court;

5. That, the sum of $231,500.00 is the deficiency due for Tracts 309 and 310, pursuant to the verdict set forth above:

6. That, the plaintiff, United States of America, is hereby directed to pay into the Registry of the Court the sum of $213,500.00, together with interest at the rate of six percent (6%) per annum from September 29, 1967 until the date of such deposit;

7. That, the Clerk of the Court is hereby authorized and directed to pay from the deposit made in this cause into the Registry of the Court the following sum: $214,000.00, together with interest at the rate of six percent (6%) per annum on $213,500.00 from September 29, 1967, until the date of such deposit to:

Chester Fuller and Maxine L. Fuller, his wife
c/o Kramer, Roche, Burch, Streich & Cracchiolo
Attorneys at Law
567 First National Bank Building
411 North Central Avenue
Phoenix, Arizona 85004

8. That, the Court shall, and hereby does, retain juris-

diction to make and enter herein such further orders and judgments as may be necessary and proper in the premises.

DONE IN OPEN COURT this 24th day of Sept, 1968.

/s/ Walter E. Craig
United States District Judge

APPROVED AS TO FORM;
KRAMER, ROCHE, BURCH, STREICH & CRACCHIOLO
By .....
Attorneys for defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

UNITED STATES OF AMERICA, PLAINTIFF, VS. 939.62 ACRES OF LAND, more or less, situate in Yuma and Mohave Counties, State of Arizona; CHESTER FULLER, et al., and UNKNOWN OWNERS, DEFENDANTS.	No. Civ. 6471-Phx. Notice of Appeal Tracts 309 and 310

[Filed Nov. 21, 1968, WM. H. LOVELESS, *Clerk*, United States District Court for the District of Arizona by WINONA ANDRE, *Deputy Clerk*]

NOTICE IS HEREBY GIVEN that the United States of America, plaintiff in the above-entitled cause, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the judgment entered in this action on September 24, 1968.

EDWARD E. DAVIS
United States Attorney

/s/ Richard S. Allemann
RICHARD S. ALLEMANN
Assistant United States Attorney

Copy hereof mailed this 21st
day of November, 1968 to:

Kramer, Roche, Burch, Streich & Cracchiolo
Attention: Mr. Frank Haze Burch
567 First National Bank Building
Phoenix, Arizona 85004

/s/Richard S. Allemann
RICHARD S. ALLEMANN
Assistant United States Attorney

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT, v. CHESTER FULLER AND MAXINE FULLER (939.62 acres of land, more or less, situated in Yuma and Mohave Counties, State of Arizona), DEFENDANTS-APPELLEES.	No. 23,932

[April 29, 1971]

Appeal from the United States District Court
for the District of Arizona

Before: ELY, WRIGHT and KILKENNY. *Circuit Judges.*
WRIGHT, *Circuit Judge*:

This is an appeal in a condemnation action from judgment entered on a jury verdict fixing $350,000 as just compensation for the taking of two tracts totalling 920 acres. This court has jurisdiction under 28 U.S.C. § 1291. On appeal by the United States, we affirm.

The land taken was used by the landowners, Mr. and Mrs. Fuller, as part of a 44,768-acre ranch operation composed of:

fee land	1,280 acres
state leased land	12,027 acres
federal domain leased under the Taylor Grazing Act (43 U.S.C. § 315b)	31,461 acres
TOTAL	44,768 acres

In 1967 the United States instituted a proceeding in eminent domain to acquire title to two parcels of the Fullers' fee land, totaling 920 acres. At no time prior to or during the pendency of the condemnation action were the Fullers' exclusive, revocable grazing permits on the public

lands revoked, nor were such lands included in the condemnation action.

It was the government's theory that in determining the fair market value of the base fee lands taken, no consideration should be given to the use to which such lands might be put in conjunction with adjacent public domain lands covered by federal grazing permits. Fuller contended, on the other hand, that since the highest and best use of his fee lands (together with state and federal leased lands) was that of a cattle ranch, the use of the leased federal public domain lands should be considered in determining the fair market value of his fee lands.

Fuller was engaged in a large-scale cattle operation known as a year-round "cow-calf" ranch, made possible because the fee lands were situated at the confluence of two rivers. Cheap water was available, and the fee lands had been cleared, cultivated and irrigated. They were planted to alfalfa and other grasses and Fuller did not have to rely on the condition of the grazing land and could graze his cattle the year round.

It was a stable and profitable operation. Without the fee lands, the only practical use would be raising steers, which would be purchased annually, fattened until the desert feed dried up and then sold.

The district court instructed the jury as follows:

> ". . . [R]eference has been made to grazing permits held by the defendants on public land. You are instructed that such permits are mere licenses which may be revoked and are not compensable as such. However, if you should determine that the highest and best use of the property taken is a use in conjunction with those permit lands, you may take those permits into consideration in arriving at your value of the subject land, keeping in mind the possibility that they may be withdrawn or cancelled at any time without a constitutional obligation to pay the compensation therefor. . . . In fixing the fair market value of the fee land being taken and the compensation to be awarded, you are not to award defendants any compensation for the land owned by the United States or the State of Arizona."

Government witnesses fixed the value of the condemned land at $135,000. The valuation testimony of the landowners fixed it at $682,000 to $985,000. The jury awarded $350,000.

The trial court's instruction to the jury was in accord with the rule of *United States v. Jaramillo,* 190 F.2d 300 (10th Cir. 1951). In a factual situation almost identical to the case before us, the Court of Appeals for the 10th Circuit said:

> "In the judicial determination of fair value as just compensation for the land taken, the highest and most profitable use for which it is reasonably adaptable may be considered, 'not necessarily as the measure of value, but to the full extent that the prospect of demand for such use affects the market value while the property is privately held,' (Citations omitted.) All rights, easements and privileges appurtenant thereto should be considered in estimating its fair value or compensation to be paid, taking into account also the possibility of their being discontinued without resulting obligation." *Jaramillo* at p. 302.

Recognizing that *Jaramillo* is in point, the government submits that the rule of that case is wrong and inconsistent with that of *United States v. Rands,* 389 U.S. 121 (1967). *Rands* was a navigational servitude case. There the Court held that the compensable value of private riparian fast lands taken by the government did not include its special value as a port site since the owner had no right of access to the navigable waters which could be legally protected as against the United States.

A careful examination of the rationale of the navigational servitude cases and the federal legislation regarding grazing permits gives rise to a basis for distinguishing the cases relied upon by the government. In *Rands,* it was said:

> "The Commerce Clause confers a unique position upon the Government in connection with navigable waters. 'The power to regulate commerce comprehends the control for that purpose, and to the extent necessary, of all the navigable waters of the United States. . . . For this purpose they are the public property of the nation, and subject to all the requisite legislation by

Congress.' *Gilman v. Philadelphia,* 3 Wall. 713, 724-725 (1866). This power to regulate navigation confers upon the United States a 'dominant servitude,' *FPC v. Niagara Mohawk Power Corp.,* 347 U.S. 239, 249 (1954), which extends to the entire stream and the stream bed below ordinary high-water mark. The proper exercise of this power is not an invasion of any private property rights in the stream or the lands underlying it, for the damage sustained does not result from taking property from riparian owners within the meaning of the Fifth Amendment but from the lawful exercise of a power to which the interests of riparian owners have always been subject. . . . Thus, without being constitutionally obligated to pay compensation, the United States may change the course of a navigable stream, . . . or otherwise impair or destroy a riparian owner's access to navigable waters, . . . even though the market value of the riparian owner's land is substantially diminished." *United States v. Rands,* 389 U.S. at 122-23.

Similarly, in *United States* v. *Twin City Power Co.,* 350 U.S. 222 (1956), the dominant navigational servitude was held to entitle the government to condemn land without considering its special value as a hydroelectric site.

The government is correct in its assertion that the constitutional provision and subsequent court interpretation authorized Congress to regulate navigable streams to the total exclusion of private rights. *United States v. Rands,* 389 U.S. 121, 123. However, when Congress legislates in a manner that recognizes special rights or privileges in navigable waters, then the government is required to compensate for the destruction of such rights, notwithstanding the fact that Congress had the constitutional power to exclude private rights completely. *United States v. Twin City Power Co., supra* at 225.

A study of the Taylor Grazing Act leads to the conclusion that Congress exercised less than its constitutional power over public lands and recognized special rights against third parties and sometimes the government itself. Unlike navigational servitude, there are some private rights and privileges bestowed and protected by the Act which justify the conclusion that the uses to which federal grazing lands

are dedicated are unlike the undiminished public uses of navigable streams.

For example, the Act creates section 3 lands and section 15 lands. The latter are disconnected, non-contiguous tracts which are not contained in grazing districts. Section 3 lands, involved here, are located within grazing districts and are administered by the Secretary of the Interior through a system of preferential grazing permits. These run as long as ten years and permit holders have a preferential right to renewal. 43 U.S.C. § 315b.

Though the Act does not create any interest in the lands themselves, it does require that "grazing privileges recognized and acknowledged shall be adequately safeguarded" by the government. 43 U.S.C. § 315b. *See Red Canyon Sheep Co. v. Ickes,* 98 F.2d 308, 314 (D.C. Cir. 1938).

While grazing permits are unrevoked, neither the grantor nor third party may interfere with their exercise. In fact, the government has an affirmative obligation to safeguard them adequately. *Oman v. United States,* 179 F.2d 738 (10th Cir. 1949).

> "Other courts have held that these permits conferred rights subject to judicial protection. In Arizona the holder of similar grazing permits was said to be entitled to an action of trespass against encroaching ranchers. *Garcia v. Sumrall,* 58 Ariz. 526, 121 P.2d 640. Even the opinion of the *Osborne* case, *supra,* implied that these permits would be 'highly valuable as between private persons'. . . . In the *Red Canyon Sheep Co.* case, 98 F.2d 308, it was held that, whatever the rights accruing under the permits be denominated, they were entitled to equitable protection." *Oman* at pp. 741-42.

In *McNeil v. Seaton,* 281 F.2d 931, 934 (D.C. Cir. 1960), the court held that a new grazing district rule could not be applied to one who had obtained his permit during the first priority period established by the Act. In so holding, the court said that while the permits exist, "they are something of real value . . . which have their source in an enactment of Congress." The court concluded by saying that the permit holders can be protected against wrongful interference by the United States with the statutory rights or privileges represented by the permits.

Thus it can be seen that the government's control over

Taylor Grazing Act lands is not the same as the absolute control enjoyed under the navigational servitude.

There is another basis for distinguishing the navigational servitude cases represented by *Rands* and *Twin City*. In those cases the issue was whether the government should pay additional compensation for the theoretical value of potential uses, *i.e.*, port sites and hydroelectric operation. Actual investments had not occurred. There was no congressional policy of use and development of navigable waters as a part of private commercial enterprises.

In situations where the government has requested private investment to help develop and utilize navigable waters, then the government has had to pay the "going concern" value upon condemnation. *Monongahela Navigation Co. v. United States*, 148 U.S. 312 (1893). In *Monongahela* the government had to pay both for locks and a dam built at the government's invitation.

The purpose of the Taylor Grazing Act was to develop and stabilize the western cattle business. By providing for regulated use and protection of grazing rights, the government helped to improve the use of the land as did the changes which effected public use of the river in *Monongahela*. The difference between our case and that is one of degree.

It was, therefore, not improper for the trial court to allow the jury to consider the conjunctive use of the fee and permit lands, so long as the jury was admonished to consider the possibility that the permits might be withdrawn at any time without compensation.

The government's remaining arguments are without merit. Some rely on cases which are distinguishable because the permits were cancelled and the holders of the permits were seeking compensation.[1] Other contentions are answered by *Jaramillo*, with which decision we are in accord.

Affirmed.

KILKENNY, Dissenting:

I believe that *United States v. Rands*, 389 U.S. 121 (1967), controls on the federal lands and that the judgment of the lower court should be reversed.

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[1] *Osborne v. United States*, 145 F.2d 892 (9th Cir. 1944). *Acton v. United States*, 401 F.2d 896 (9th Cir. 1968), *cert. den.* 393 U.S. 1121 and 395 U.S. 945. *Mollohan v. Gray*, 413 F.2d 349 (9th Cir. 1969).

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 23932

UNITED STATES OF AMERICA,
APPELLANT

v.

CHESTER FULLER, ET AL. (939.62 ACRES OF LAND, MORE OR LESS, SITUATE IN YUMA AND MOHAVE COUNTIES, STATE OF ARIZONA, TRACTS 309 AND 301),
APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

PETITION OF THE UNITED STATES FOR REHEARING

The United States of America, appellant, presents this petition for rehearing for the reasons stated below.

1. *The majority opinion rests on a false factual and legal premise.*—In attempting to show that in federal condemnation a landowner has greater rights over public domain land held under revocable license than a riparian landowner has over a navigable river over which the United States has only a servitude, this Court wrote: "Unlike navigational servitude, there are some private rights and privileges bestowed and protected by the [Taylor Grazing] Act which justify the conclusion that the uses to which federal grazing lands are dedicated are unlike the undiminished public uses of navigable streams" (Slip Op. 4).

The Government's rights under the navigation servitude are, if anything, more restricted than its rights to its own lands covered by grazing permits. The United States does not have fee ownership of the riverbed. *Shively* v. *Bowlby*, 152 U.S. 1, 31 (1893). Fee title rests either in the state or in the riparian owner. *United States* v. *Chandler-Dunbar Co.*, 229 U.S. 53, 60 (1913). A riparian owner actually has

a vested right of access to navigable waters and the right to fill to the bulkhead line—rights which are servient only to the Government's navigational servitude. *United States* v. *River Rouge Co.*, 269 U.S. 411, 417 (1926). Moreover, if the United States floods fast lands above the high water mark,[1] or imposes a flowage easement over fast lands, it must pay compensation.[2]

When third parties, other than the Federal Government, interfere with lawfully placed structures in navigable streams, the owner must be paid. *Railway Company* v. *Renwick*, 102 U.S. 180 (1880); *Pike Rapids Power Co.* v. *Minneapolis, St. P. & S. S. M. R. Co.*, 99 F.2d 902 (C.A. 9, 1938), cert. den., 305 U.S. 660; *Great Northern Ry. Co.* v. *Washington Electric Co.*, 197 Wash. 627, 86 P.2d 208, 217 (1939); cf. *United States* v. *Chandler-Dunbar Co.*, 229 U.S. 53, 70 (1913).

The majority opinion likewise errs in limiting the Government's navigation servitude to "the theoretical value of potential uses" (Slip Op. 5). While *United States* v. *Rands*, 389 U.S. 121 (1967), involved a potential port site and *United States* v. *Twin City Power Co.*, 350 U.S. 222 (1950), involved a potential hydroelectric site, the bases of those opinions is not potential uses. The crux of the navigation servitude cases is that where the Government appropriates the flow of navigable waters under the Commerce Clause, it is "beholden to no one." *United States* v. *Grand River Dam Authority*, 363 U.S. 229, 233 (1960). Riparian owners have many times sustained substantial *actual* loss for which the Fifth Amendment has required no compensation. The United States is not chargeable under the Fifth Amendment when it orders removal of a wharf, *Greenleaf Lumber Co.* v. *Garrison*, 237 U.S. 251 (1915), or when it requires removal or alteration of a bridge constructed pursuant to a general act of Congress which necessarily contemplated a large investment of private capital. *Louisville Bridge Co.* v. *United States*, 242 U.S. 409, 420 (1917). Thus, in *United States* v. *Chicago, M., St. P. & P. R. Co.*, 312 U.S. 92 (1941), the United States was not liable for damage to railroad tracks located between high- and low-water marks caused

[1] *United States* v. *Willow River Co.*, 324 U.S. 499, 509 (1945).

[2] *United States* v. *Virginia Electric Co.*, 365 U.S. 624, 627 (1961).

by the raising of the level of the Mississippi River up to ordinary high-water mark. The Supreme Court explained (at 599) that any structure placed in the bed of a navigable river is subject to the risk of injury or destruction without compensation. Accord: *United States* v. *Chandler-Dunbar Co.*, 229 U.S. 53, 70 (1913).

In *United States* v. *531.13 Acres of Land, etc.*, 366 F.2d 915 (C.A. 4, 1966), cert. den., *sub nom. Duke Power Co.* v. *United States*, 385 U.S. 1025, a Rule 71A(h) commission made an award to the Duke Power Company of $500,000 as the fair value of hydroelectric facilities. This award was reversed because this component was not compensable.

In condemnation the Fifth Amendment requires the United States to pay only for the taking of vested property rights, "not for opportunities which the owner may lose." *United States ex rel. T.V.A.* v. *Powelson*, 319 U.S. 266, 282 (1943). Accordingly, many items of value are not compensable: frustrated business opportunities, *Omnia Co.* v. *United States*, 261 U.S. 502 (1923); consequential destruction of a business, *Mitchell* v. *United States*, 267 U.S. 341 (1925). The Supreme Court has repeatedly recognized that the "existence of value alone does not generate interests protected by the Constitution against diminution by the Government * * *." *Reichelderfer* v. *Quinn*, 287 U.S. 315, 319 (1932). Similarly, a lessee's mere expectancy of renewal is not a property interest. *United States* v. *Scully*, 409 F.2d 1061 (C.A. 10, 1969), cert. den., 396 U.S. 876, nor is a tenancy that is cut short by a termination-by-condemnation clause. *United States* v. *Petty Motor Co.*, 327 U.S. 372, 380 (1946). Nor can a claimant recover for the taking of lands in which he has no estate or interest. *United States* v. *Honolulu Plantation Co.*, 182 F.2d 172, 175 (C.A. 9, 1950), cert. den., 340 U.S. 820.

The majority opinion's observation that the difference between this case and *Monongahela Navigation Co.* v. *United States*, 148 U.S. 312 (1893), is "one of degree" does not support the result here and is at variance with the Supreme Court's and this Court's subsequent explanation of that case.[3] *Monongahela* involved condemnation of franchises and physical assets constructed at the instance and

[3] The Supreme Court has subsequently explained that *Monongahela* rests "primarily upon the doctrine of estoppel," *Omnia Co.* v. *United States*, 261 U.S. 502, 513-514 (1923); *United States ex rel. T.V.A.* v. *Powelson*, 319 U.S.

implied invitation of Congress. There is no such invitation here.

In suggesting that livestock operations were invited to improve the public lands by the enactment of the Taylor Grazing Act, the majority has chosen to ignore the fact that such grazing at bargain rates represents a subsidy to the industry. See *Pankey Land & Cattle Company* v. *Hardin*, 427 F.2d 43 (C.A. 10, 1970).

In short, there are many instances where valuable rights, good against the rest of the world, are not compensable when disturbed or destroyed by the sovereign in the exercise of its eminent domain powers. That point was clearly expressed by this Court in *Osborne* v. *United States*, 145 F.2d 892, 896 n. 5 (1944):

> Numerous instances are to be found where permits issued by a sovereign are highly valuable as between private persons but which may be revoked by the sovereign without the payment of compensation: e.g. bridge franchises, Louisiana Bridge Co. v. United States, 1917, 242 U.S. 409, 37 S.Ct. 158, 61 L.Ed. 395; United States v. Wauna Toll Bridge Co., 1942, 9 Cir., 130 F.2d 855; licenses to erect river and harbor structures, United States v. Chicago, M., St. P. & P. R. Co., 1941, 312 U.S. 592, 61 S.Ct. 772, 85 L.Ed. 1064; Willink v. United States, 1916, 240 U.S. 572, 36 S.Ct. 422, 60 L.Ed. 808; Greenleaf Johnson Lumber Co. v. Garrison, 1915, 237 U.S. 251, 35 S.Ct. 551, 59 L.Ed. 939; United States v. Chandler-Dunbar Water Power Co., 1913, 229 U.S. 53, 70, 33 S.Ct. 667, 57 L.Ed. 1063; Berger v. Ohlson, 1941, 9 Cir., 120 F.2d 56; permits to erect and maintain telephone and power lines, Swendig v. Washington Co., 1924, 265 U.S. 322, 44 S.Ct. 496, 68 L.Ed. 1036; United States v. Colorado Power Co., 1916, 8 Cir., 240 F.2d 217, 220; licenses to occupy, lease, or sell fishing areas, Lewis Blue Point Oyster Cultivation Co. v. Briggs, 1913, 229 U.S. 82, 33 S.Ct. 679, 57 L.Ed. 1083.

The Government's navigation easement means only that ie flow of a navigable stream is "in no sense private propty." *United States* v. *Chandler-Dunbar Co.*, 229 U.S. 53, 5 (1913).

, 281 (1943); *United States* v. *Rands*, 389 U.S. 121, 126 (1970); see also *ited States* v. *87.30 Acres of Land, Etc., State of Washington*, 430 F.2d 0 (C.A. 9, 1970).

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JUNE 1971

Docketed

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed Jun. 23, 1971, Wm. B. Luck, *Clerk*]

UNITED STATES OF AMERICA, Plaintiff-Appellant, v. CHESTER FULLER and MAXINE FULLER (939.62 acres of land, more or less, situated in Yuma and Mohave Counties, State of Arizona), Defendants-Appellees.	No. 23,932 ORDER

Before: ELY, WRIGHT and KILKENNY.

The Petition for Rehearing, having been duly considered, is denied. Judge Kilkenny would grant the Petition for Rehearing.

DATED:

SUPREME COURT OF THE UNITED STATES

No. 71-559

UNITED STATES,
PETITIONER,

v.

CHESTER FULLER, ET AL.

ORDER ALLOWING CERTIORARI. Filed January 17, 1972.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted.

☆ U.S. Government Printing Office: 1972—457-455/502